

Vol. 1

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER

vs.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 1, 1944
CERTIORARI GRANTED OCTOBER 9, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER,

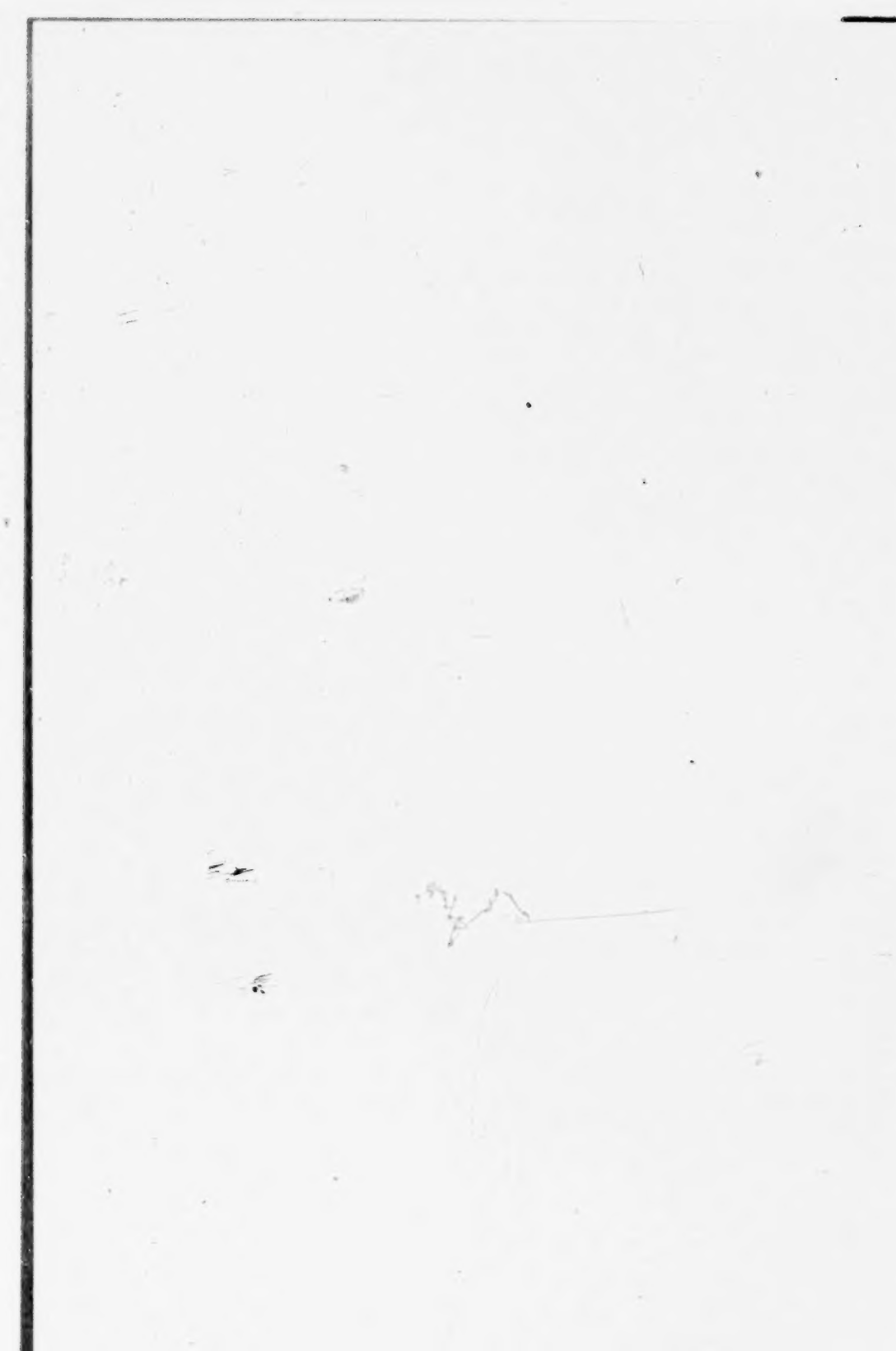
vs.

WILLOW RIVER POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CLAIMS

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In Court of Claims

No. 45067

WILLOW RIVER POWER COMPANY, A WISCONSIN CORPORATION,
PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed Feb. 6, 1940

The plaintiff herein by R. M. Rieser, its attorney, by this petition for cause of action shows to the court and alleges as follows:

1. The plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Wisconsin and as such is authorized and empowered by its charter to engage in the generation, distribution and sale of electric energy and power as a public utility under the Wisconsin Statutes, and is engaged as such with its principal place of business at Hudson, Wisconsin and serves numerous customers and municipalities in St. Croix County, Wisconsin and adjacent territory.

2. That pursuant to various acts of Congress and supplementary legislation of Congress, particularly the act approved January 21,

1927 (44 Statutes 1010), and acts amendatory thereof and supplementary thereto, the Government of the United States through its agencies has authorized and has undertaken to and did construct various dams, levees, control works, and other improvements in the Mississippi River in the area thereof between the confluence of the Wisconsin and Mississippi Rivers and the City of St. Paul, Minnesota, among which were dams across the Mississippi River at Alma, Wisconsin, known and described by the Government and its agencies as Dam and Lock #4, and also as the Alma Dam, which will be the designation of said dam hereinafter in these pleadings, and one located upstream from Red Wing, Minnesota, and upstream from said Alma dam and known and described by the Government and its agencies as Dam and Lock #3, or Red Wing Dam, which latter designation will for convenience be used to designate said dam hereinafter. Upstream from the Red Wing Dam and near the village of Prescott, Wisconsin, is the confluence of the Mississippi and St. Croix Rivers, both of which are navigable streams of the United States. The St. Croix River is a boundary stream between the states of

Minnesota and Wisconsin and rises in the northwesterly part of Wisconsin, flowing southerly past the cities of Stillwater, Minnesota, and Hudson, Wisconsin, until it joins the Mississippi River at Prescott. That the general course of the streams herein described and referred to, and the relation of the points thereon as referred to in this petition, appear on a plat attached hereto as Exhibit A, and by this reference are made a part hereof. As a result of construction of said dams at Alma and Red Wing, the water in the St. Croix River has been backed up and caused to raise in the St. Croix River to a maximum of nine (9) feet above the normal low water level of said stream, and thereby the Gov-

ernment of the United States took, appropriated to itself,
3 and damaged lands, improvements, and developments along the St. Croix River within the areas flooded by and damaged by such nine (9) foot rise in water, and especially the improvements and property of the plaintiff herein as more particularly described hereinafter. The government of the United States now uses and employs part of the dam of the plaintiff as a dyke and as a means of limiting the spread of the back water created by the construction of such dams and thereby causes damage to the dam of the plaintiff, both by reducing its effectiveness and usefulness and by causing said dam to deteriorate more rapidly from the effect of wave action, stream action, and ice.

3. The Willow River, a nonnavigable stream of the United States, rises in Northwestern Wisconsin and empties into the St. Croix River at the City of Hudson, Wisconsin. (See Exhibit A attached hereto.)

4. Along the course of the Willow River, the plaintiff has developed several integrated and synchronized water power sites by construction of dams at such sites, one of which is located near the point where the Willow River discharges into the St. Croix River, on property described as follows:

"Sections 23 and 24 Township 29 North, Range 20 west and Sections 13, 18, and 19 Township 29 North Range 20 West in St. Croix County, Wisconsin."

5. At low water stages of the St. Croix River this dam, prior to the building of the dams at Alma and Red Wing, had an effective operating head of 22.5 feet. As a result of the construction of the aforesaid dams, and the raising of the water in the St. Croix river as described herein, this head has been reduced to 13½ feet. This reduction in operating head has resulted in the reduction of generating capacity of said dam of about 220 H. P.

4 and 150 Kilowatts. The taking, appropriating, and damaging aforesaid was the direct, natural, proximate, and

necessary result of the erection of said dams and the general result contemplated, anticipated, and predicted by the Government engineers prior to the erection of the dam, as fully appears from Government reports, particularly Documents #290, 71st Congress, 2nd session, and Document #137, 72nd Congress, 1st Session, and other reports and records not now available, but which as plaintiff is informed and believes, are in control of the respondent and which plaintiff has attempted to obtain, but without success. In order to obtain the benefits of such dams, it was necessary to take, appropriate, and damage the property of the plaintiff, and such taking, appropriating, and damaging to the property of the plaintiff has resulted in material benefit to the vast and extensive undertaking of the Government and the use of the property of the plaintiff so taken, appropriated, and damaged is necessary to the full realization by the defendant of the benefits to be obtained from such dams. The said taking, appropriating, and damaging of the plaintiff's property has so reduced its generating capacity as to require the investment of large additional sums in supplying energy lost at continued extra cost to the plaintiff and has destroyed the efficiency and effectiveness of its generating facilities aforesaid to the damage to the plaintiff in the sum of \$125,000.00, and the plaintiff is justly entitled to recover the amount claimed after allowing all just credits and offsets.

6. That no action on the claim aforesaid has been taken by Congress or by any department of the Government so far as plaintiff is informed, except that pursuant to a resolution adopted

March 16, 1939 by the Committee on Rivers and Harbors of the House of Representatives of the Congress of the United States, the Board of Engineers for Rivers and Harbors was requested to review reports of said Board in House Document #137, 72nd Congress, first session; that said Board through authorized representatives did conduct investigations and this plaintiff filed, at a hearing at Stockholm, Wisconsin, on July 12, 1939, notice and general description of its claim.

7. That the plaintiff is now and at all times has been the lawful owner of the aforesaid claim and said claim has never been assigned or transferred in whole or in part.

8. That the plaintiff has at all times shown true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

As and for a second and further cause of action, the plaintiff above named alleges as follows:

1. The plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Wisconsin, and as

such is authorized and empowered by its charter to engage in the generation, distribution, and sale of electric energy and power as a public utility under the Wisconsin Statutes, and is engaged as such with its principal place of business at Hudson, Wisconsin, and serves numerous customers and municipalities in St. Croix County, Wisconsin, and adjacent territory.

2. That pursuant to various acts of Congress and supplementary legislation of Congress, particularly the act approved January 21, 1927 (44 Statutes 1010), and acts amendatory thereof and supplementary thereto, the Government of the United States through its agencies has authorized and has undertaken to and did construct

6 various dams, levies, control works, and other improvements in the Mississippi River in the area thereof between the confluence of the Wisconsin and Mississippi Rivers and the City of St. Paul, Minnesota, among which were dams across the Mississippi River at Alma, Wisconsin, known and described by the Government and its agencies as Dam and Lock #4, and also as the Alma Dam, which will be the designation of said dam hereinafter in these pleadings, and one located upstream from Red Wing, Minnesota, and upstream from said Alma dam and known and described by the Government and its agencies as Dam and Lock #3, or Red Wing Dam, which latter designation will for convenience be used to designate said dam hereinafter. Upstream from the Red Wing Dam and near the village of Prescott, Wisconsin, is the confluence of the Mississippi and St. Croix Rivers, both of which are navigable streams of the United States. The St. Croix River is a boundary stream between the states of Minnesota and Wisconsin, and rises in the northwesterly part of Wisconsin, flowing southerly past the cities of Stillwater, Minnesota, and Hudson, Wisconsin, until it joins the Mississippi River at Prescott. That the general course of the streams herein described and referred to, and the relation of the points thereon as referred to in this petition, appear on a plat attached hereto as Exhibit A, and by this reference are made a part hereof. As a result of construction of said dams at Alma and Red Wing, the water in the St. Croix River has been backed up and caused to raise in the St. Croix River to a maximum of nine (9) feet above the normal low water level of said stream, and thereby the Government of the United States took, appropriated to itself, and damaged lands, improvements, and developments along the St. Croix River within the areas flooded by and damaged by such nine (9) foot rise in

7 water, and especially the property of the plaintiff as herein-after more particularly described. The Government of the United States now uses and employs part of the property of the plaintiff by flooding the same and thereby has destroyed the

use and value of the property of the plaintiff in the manner herein more specifically described.

3. The Apple River, a nonnavigable stream of the United States rises in northwestern Wisconsin and empties into the St. Croix River north of the City of Hudson, Wisconsin, and somewhat below the City of Stillwater, Minnesota. (See Exhibit A attached hereto.)

4. Near the mouth of the Apple River is a water power site owned by the plaintiff, at which the water of the Apple River prior to the construction of the dams described above fell very rapidly to a level nearly that of the normal level of the St. Croix River and said site prior to the construction of said dams was a valuable site for the erection of an efficient and useful dam so located with reference to other developments of the plaintiff as described in the first cause of action hereof, to which reference is made, as to be readily integrated with such operation and as to be economically and efficiently operated in connection with such operations; that said site was located upon real estate described as follows:

"Sections 21 and 28 of Township 31, North Range 19 West in St. Croix County, Wisconsin."

5. At low water stages of the St. Croix River, it was possible to develop this site into an effective and useful dam. As a result of the construction of the aforesaid dams, and the raising of the water in the St. Croix River as described herein, the possible head of this dam has been almost entirely destroyed, and its usefulness and ef-

fectiveness has been destroyed to a point where it is no longer

8 possible to develop the site economically or operate any dam at the site profitably, and the value of the plaintiff's property

has therefore been entirely destroyed, except for the value of the land as agricultural lands which is nominal as plaintiff is informed and believes. The taking, appropriating, and damaging aforesaid was the direct, natural, proximate, and necessary result of the erection of said dams and the general result contemplated, anticipated, and predicted by the Government Engineers prior to the erection of the dam as fully appears from Government reports, particularly Document #290, 71st Congress, 2nd session, and Document #137, 72nd Congress, 1st session, and other reports and records, not now available, but which as plaintiff is informed and believes are in control of the respondents and which plaintiff has attempted to obtain but without success. In order to obtain the benefits of such dams it was necessary to take, appropriate, and damage the property of the plaintiff, and such taking, appropriating and damaging to the property of the plaintiff has resulted in material benefit to the vast and extensive undertaking of the Government and the use of the property of the plaintiff so taken, appropriated, and dam-

aged is necessary to the full realization by the defendant of the benefits to be derived from such dams. The said taking, appropriating, and damaging of the plaintiff's property has entirely destroyed the value of the property aforesaid and part of the property so taken, appropriated, and destroyed is actually used by and beneficial to the Government as hereinabove alleged, all to the damage of the plaintiff in the sum of \$15,000.00, and the plaintiff is justly entitled to recover the amount claimed after allowing all just credits and offsets.

6. That no action on the claim aforesaid has been taken by Congress or by any department of the Government so far as plaintiff is informed, except that pursuant to a resolution adopted March 16, 1939, by the Committee on Rivers and Harbors of the House of Representatives of the Congress of the United States, the Board of Engineers for Rivers and Harbors was requested to review reports of said Board in House Document #137, 72nd Congress, first session; that said Board through authorized representatives did conduct investigations and this plaintiff filed, at a hearing at Stockholm, Wisconsin, on July 12, 1939, notice and general description of its claim.

7. That the plaintiff is now and at all times has been the lawful owner of the aforesaid claim and said claim has never been assigned or transferred in whole or in part.

8. That the plaintiff has at all times shown true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

Wherefore the plaintiff demands judgment against the defendant in the sum of \$125,000.00 on the first cause of action herein and in the amount of \$15,000.00 on the second cause of action herein and for its costs and disbursements.

R. M. RIESER,

Attorney for the Plaintiff.

JOHN WATTAWA,

LYNN ASHLEY,

Of Counsel.

[Duly sworn to by A. R. Shultz; jurat omitted in printing.]

10 *Proceedings relative to defendant's special answer and plea in bar*

On March 18, 1940, the defendant filed a general traverse.

On October 2, 1941, the defendant filed a motion for leave to withdraw its general traverse and to file a special answer and plea in bar.



On October 14, 1941, said motion was allowed and defendant's special answer and plea in bar was filed, which is as follows:

11 *Defendant's special answer and plea in bar*

Filed Oct. 15, 1941

The defendant, answering the averments of the petition filed in the above-entitled cause, shows unto the Court:

FIRST CAUSE OF ACTION

1. It admits the allegations of Paragraph 1 of the petition.

2. It admits that, pursuant to the Act of Congress approved January 21, 1927 (44 Stat. 1010) and Acts amendatory thereof and supplementary thereto, the United States constructed various dams, levees, control works, and other improvements in the Mississippi River in the area thereof between the confluence of the Wisconsin and the Mississippi Rivers and the city of St. Paul, Minnesota, among which were dams across the Mississippi River at Alma, Wisconsin, known and described as Lock and Dam No.

4 and another located upstream from Red Wing, Minnesota, 12 known and described as Lock and Dam No. 3; that upstream from Lock and Dam No. 3 and near the village of Prescott, Wisconsin, is the confluence of the Mississippi and the St. Croix Rivers, both of which are navigable streams of the United States; and that the St. Croix River is a boundary stream between the states of Minnesota and Wisconsin, and rises in the northwesterly part of Wisconsin, flowing southerly past the cities of Stillwater, Minnesota and Hudson, Wisconsin, until it joins the Mississippi River at Prescott; but defendant denies that, as a result of the construction of said locks and dams, the water in the St. Croix River has been backed up and caused to raise in said river to a maximum of 9 feet above the normal low water level of said stream. Defendant further denies that the Government of the United States took, appropriated, and damaged any lands, improvements, and developments along the St. Croix River owned by plaintiff as a result of the construction of said locks and dams, and denies that the United States now uses and employs any part of the dam of plaintiff as a dyke and as a means of limiting the spread of back water created by the construction of such locks and dams, and further denies causing damage to plaintiff's dam either by reducing its effectiveness and usefulness or by causing it to deteriorate more rapidly from the effect, of wave action, stream action, and ice.

Further answering, defendant states and shows unto the
13 Court that the downstream end of the St. Croix River, between Stillwater and Prescott on the Mississippi River, a distance of 24 miles, is widened considerably, and is sometimes referred to as Lake St. Croix; that the lake portion of the river has a slope or fall of less than one foot in 24 miles whereas throughout the distance of 140 miles above Stillwater the river has an average slope of 2.4 feet per mile; that the city of Hudson is located on the eastern shore of Lake St. Croix, 16 miles above its confluence with the Mississippi River.

Further answering, defendant states and shows unto the Court that the water level of Lake St. Croix is variable and seasonal, the fluctuations depending upon the annual precipitation throughout the watershed of that river, the time and rapidity of spring thaws, the amount of annual snow and rainfall, and the existing stage of water in the Mississippi River. That in the spring and early summer months the water level of said lake has varied generally between elevations 670 feet above mean sea level and 680 feet m. s. l. with occasional falls below and rises above said elevations.

Further answering, defendant states that Alma, Wisconsin, is approximately 75 miles below or downstream from the city of Hudson, Wisconsin; that Dam No. 4, constructed at Alma, was built to a crest elevation of 667 feet in m. s. l.; that said dam, completed on June 26, 1935, was provided with movable roller gates, capable of being opened and closed at will, and thus permitting
a regularization and stabilization of the water level in the
14 pool above; that the effect of said dam, with gates closed, is to raise the water in the pool above to elevation 667'; that the mouth of the St. Croix River is approximately 59 miles upstream from Lock and Dam No. 4; that the maintenance and operation of said dam had but a negligible effect on the elevation of the water level in Lake St. Croix upstream as far as the city of Hudson; that since the completion in 1938 of Government Dam No. 3, 45 miles upstream from Dam No. 4, the pool above the last named dam has had no effect upon the water level of Lake St. Croix; that at no time has the water level in Lake St. Croix at the city of Hudson been increased above the ordinary high water mark of 676 feet m. s. l. opposite that city, as a direct consequence of the maintenance and operation of said Dam No. 4.

That Lock and Dam No. 3, located in the Mississippi River, approximately 30 miles downstream from the city of Hudson and 45 miles upstream from Dam No. 4, was completed on March 30, 1938, and full pool was attained on August 12, 1938. Dam No. 3 was constructed with a crest elevation of 675 feet m. s. l. which produced a normal pool level above it of the same elevation. The

dam is provided with movable roller gates, and, as the flow in the river increases, the level of the pool immediately above the dam is lowered by opening the gates clear of the water, thereby producing open river conditions and thus the normal pool elevation is maintained. If higher elevations occur beyond the
15 normal pool elevation, such elevations arise from natural conditions and are not caused by or due to the maintenance and operation of Lock and Dam No. 3. The object, purpose, and normal effect of maintaining and operating Dam No. 3 with its gates closed is, among other things, to maintain and stabilize the water surface in Lake St. Croix, at the mouth of Willow River hereinafter referred to, and at the city of Hudson, at an elevation of approximately 675 feet m. s. l. or at approximately 1 foot below the ordinary high water mark at that location. That the object and purpose of canalizing the river by constructing said Government dams were to improve the navigable capacity of the upper Mississippi River, Lake St. Croix and other navigable waterways tributary to the Mississippi River as more particularly shown by House Department 462, 71st Cong., 2nd Sess., which is made a part of this pleading by reference.

3. Defendant admits so much of Paragraph 3 of the petition as alleges that Willow River rises in northwestern Wisconsin and empties into the St. Croix River at the city of Hudson, but defendant denies that Willow River is a nonnavigable stream of the United States. Further answering, and by way of affirmative allegation, defendant shows unto the Court that Willow River is a navigable stream of the United States and that, prior to the construction by plaintiff of a dam across the mouth of said
16 river, thereby blocking ingress thereto and egress therefrom, as more particularly referred to hereinafter, was capable of floating water-borne commerce of an interstate character, and was used for the flotation and transportation of boats and other valuable property thereon. That by a decision of the highest court of the state of Wisconsin, handed down in 1898 in a cause entitled Willow River Club v. Wade, reported in Volume 106 of the Wisconsin Reports, at page 86, Willow River was found as a matter of fact and determined as a matter of law to be "a public navigable stream, fitted for useful commerce and transportation of persons and property thereon."

4. Defendant admits that along the course of the Willow River the plaintiff has developed several integrated and synchronized water power sites by construction of dams at such sites, one of which is located near the point where the Willow River discharges into the St. Croix River upon property more particularly described in Paragraph 4 of the petition.

Further answering, the defendant states and shows unto the Court that the dam so constructed by the plaintiff near the point where the Willow River discharges into the St. Croix River (or Lake St. Croix) was constructed upon a concrete foundation extending across or occupying the full width of the mouth of a navigable stream, and said foundation now rests upon the bed of said stream below the ordinary high water elevation thereof; that by such construction and the erection of tainter gates thereon and thereover, the water of Willow River has been dammed and caused to be artificially held back, so that its elevation since the erection of said foundation and tainter gates is approximately 22 feet above its natural elevation, in consequence of which commerce and navigation between points on the Mississippi River, by way of Lake St. Croix, and points on Willow River can no longer be carried on because of the obstruction to navigation said dam interposes, and as a further consequence the Mississippi River, of which Willow River is tributary-feeder, has been deprived of the free, natural, and unimpeded flow of water from said Willow River.

The defendant further shows unto the Court that the provisions of an Act approved March 3, 1899 (30 Stat. 1151; Tit. 33 U. S. C. Secs. 401, 403), and other enactments prohibit and make it unlawful, without first obtaining the consent of Congress and approval by the Chief of Engineers, to construct or maintain a dam or other structure within a navigable river which obstructs or impedes navigation or otherwise impairs the navigable capacity of such waterway. Defendant further shows unto the Court that plaintiff's said dam at the mouth of Willow River was erected after the passage of said Act of Congress and was reconstructed during 1934-1935 following its destruction by a flood in the year 1934; that plaintiff did not obtain the consent of Congress and the approval of the Chief of Engineers for such construction and reconstruction. Nor did plaintiff obtain a license or permit from the Federal Power Commission, as required by law, to generate electric energy at and by means of a reconstructed and new dam located within the bed of a navigable waterway of the United States.

5. Defendant denies that by reason of the construction by the Government of locks and dams numbered 3 and 4 at Alma and Red Wing, respectively, the head of water in the St. Croix River at the location of plaintiff's said dam and hydroelectric power plant at the mouth of the Willow River has been reduced from 22.5 feet to 13.5 feet as alleged in Paragraph 5 of the petition. Defendant further denies that reduction of the operating head has resulted in reducing the generating capacity of said dam as

much as 220 H. P. and 150 kilowatts, and further denies that it has taken or appropriated any property or property right of plaintiff superior to the dominant right of the United States without liability to raise permanently the level of a navigable waterway to any elevation below the ordinary high water level for the purpose of aiding navigation; and defendant further denies that in so raising the water level of the St. Croix River (or Lake St. Croix) a benefit resulted inuring to the United States and denies further that plaintiff has been damaged in the sum of \$125,000.

19 Defendant admits that the water level of the St. Croix River is raised $5\frac{1}{2}$ ft. above normal low water when the movable gates of Dam No. 3 at Red Wing are fully closed, and further admits there is some decrease in power resulting from such raising of the water level, but defendant alleges that such decrease in power is slight and of conjectural value.

Further answering, the defendant alleges and shows unto the Court that during floods and stages of water exceeding the normal pool level, the gates of the dam are raised clear of the water so as to permit the free and unobstructed flow of the river, in consequence of which the water level in Lake St. Croix is not raised above what it normally would be raised by flood water coming down the St. Croix River from above or by flood water from the Mississippi River backing into Lake St. Croix. Further answering, defendant shows unto the Court that whatever damages the plaintiff has suffered or will hereafter suffer by reason of the construction of Government Dams numbered 3 and 4 are problematical, conjectural, indirect, and inconsequential, and not recoverable against the United States in this Court within the jurisdiction granted to it by Congress.

6. Defendant admits the allegations of Paragraphs 6, 7, and 8 of the first cause of action.

7. By way of further answer, defendant shows unto the Court that no fast land, the ownership of which is claimed by plaintiff, has been flooded or invaded as a consequence of the construction of the Government dams aforementioned; that plaintiff
20 has not been ousted from the use and enjoyment of either the fast land or the hydroelectric power house constructed at the confluence of Lake St. Croix and Willow River; and that since the construction of the Government dams, electric energy has been produced at said hydroelectric power house and in equivalent amounts the same as before the operation of the Government dams.

SECOND CAUSE OF ACTION

1. Defendant admits the averments of Paragraph 1 of plaintiff's second cause of action.

2. Defendant here repeats the admissions and denials set forth in its answer to the averments of Paragraph 2 of the first cause of action, insofar as they are responsive, pertinent, and material to the averments of Paragraph 2 of the second cause of action.

Further answering, defendant denies that the Government of the United States now uses and employs a part of the property of plaintiff located on Appie River by flooding the same, and denies that it has destroyed the use and value of the property of plaintiff so located.

Further answering, and by way of affirmative averment, defendant shows unto the Court that the alleged-dam site, riparian to Apple River, topographically is situated at a ground elevation high above the probable reach of any backwater that normally might or could result from the construction of dams numbered 3 and 4 in the Mississippi River, and by reason of which fact, among others, said site as a potential and suitable location for a future dam for the generation of hydroelectric power has not been taken, appropriated, physically damaged, reduced in value, or otherwise affected as a consequence of the construction by the United States of locks and dams numbered 3 and 4.

3. Defendant admits that Apple River is a nonnavigable stream emptying into the St. Croix River north of the city of Hudson, Wisconsin, but denies that the point of entrance into the St. Croix River is below the city of Stillwater, Minnesota.

4. Defendant has no knowledge respecting the title and present legal ownership of the land described in paragraph 4 of the second cause of action as being located near the mouth of Apple River, and has no facts or other information from which it can form a belief or express an opinion concerning the same; but for the purposes of this plea only, and for the determination and judicial settlement of the jurisdictional questions and other issues of law raised by the facts alleged and affirmatively pleaded in bar herein, defendant admits plaintiff's ownership and possession of land as more particularly described in Paragraph 4 of the second cause of action; but defendant denies all remaining material averments of said Paragraph 4.

5. Defendant denies generally the averments of Paragraph 5 of the second cause of action, and denies particularly that defendant has taken, appropriated, used, rendered valueless or profitless, or otherwise damaged any fast or upland of plaintiff's as a consequence of the construction of said Government dams numbered 3 and 4, and denies that plaintiff has been damaged in the sum of \$15,000, or in any other amount.

6. Defendant admits the averments of Paragraphs 6, 7, and 8 of the second cause of action.

Wherefore: The plaintiff, having failed to state a legal cause of action, within the jurisdiction of this Court, upon either the first or second counts or causes of action, and upon the further facts alleged affirmatively herein by defendant in bar, defendant prays that the petition be dismissed.

FRANCIS M. SHEX,

Assistant Attorney General.

P. M. Cox,

Attorney.

23 *Plaintiff's reply to defendant's special answer and
plea in bar*

Filed Nov. 10, 1941

The plaintiff in reply to the averments of defendant's special answer and plea in bar filed in the above entitled cause shows unto the court as follows:

AS TO THE FIRST CAUSE OF ACTION

1. With reference to the allegations in the paragraph beginning at the bottom of page 13 of defendant's special answer plaintiff admits the same and also admits that there are variable seasonal fluctuations depending upon precipitation throughout the watershed of the St. Croix River which affect and have affected from time to time the level of Lake St. Croix but denies that the level has generally varied between elevations of 670 feet above mean sea level and 680 feet above mean sea level, and alleges that in truth and in fact the ordinary highwater level of Lake St. Croix
24 has been and prior to August 1938 was substantially 671 feet above mean sea level.

2. In further reply to said answer, plaintiff admits the allegations of the paragraph beginning near the bottom of page 13 and continuing on page 14, except that plaintiff denies the allegation that at no time has the water level in Lake St. Croix at the city of Hudson been increased above the high water mark of 676 feet above mean sea level opposite that city as a direct consequence of the maintenance and operation of Dam 4, being the Red Wing Dam.

3. Admits the allegations of the paragraph beginning on page 14 of said answer but as to the allegation as to the effect of the movable roller gates and their effect upon the pool elevation, plain-

tiff has no information sufficient whereon to base a belief and therefore puts the defendant to its proof as to the same.

4. As to the affirmative allegation in paragraph No. 3 beginning on the bottom of page 15, the plaintiff denies the same except to admit that a decision in an action entitled as therein alleged, to which the plaintiff herein was not a party, was rendered as therein alleged and alleges that said decision is not binding on the plaintiff for the reason that the plaintiff was not a party thereto and moreover that said decision is founded upon the Wisconsin test of navigability usually referred to as the "floatability" test which is not based upon commercial navigation and tests and determines navigability on entirely different considerations than does the federal test of navigability and the power of the federal government to claim jurisdiction over navigable waters
25 under the commerce clause of the Constitution of the United States.

5. Further answering said paragraph 3, plaintiff alleges that since 1864 the legislature of Wisconsin by numerous acts enacted by it has recognized the Willow River as nonnavigable for commercial purposes within the test of the Wisconsin law in that it has authorized the erection of dams and obstructions to said river and fixed rights of persons erecting such dams by the regulations provided for under the Mill Dam Act of the state of Wisconsin, an act provided for the regulation of dams upon nonnavigable streams, that such legislation includes Chapter 302, Supplement to Private and Local Laws of 1864; Chapter 122, Private and Local Laws of Wisconsin of 1866; Chapter 366, Private and Local Laws of 1868; Chapter 361, Private and Local Laws of 1869; and Chapter 115, Private and Local Laws of 1872. During all of said time when each of the acts above enumerated were enacted the Mill Dam Act was contained in Chapter 56 of the Wisconsin Statutes and is now incorporated in Chapter 31, Wisconsin Statutes, and alleges that the act of 1864 and the acts of 1868, 1869, and 1870 above referred to specifically authorized and approved the dam described in plaintiff's petition.

6. Answering the second paragraph of paragraph No. 4 of the answer, and beginning at the bottom of page 16 and continuing on page 17 of the answer, plaintiff admits the place of discharge of the Willow River as alleged in said paragraph and admits that
the dam of the plaintiff was constructed across the full width,
26 of the Willow River near its mouth but denies that the river at said point or anywhere along its course is navigable. Plaintiff admits that the water of the Willow River has been dammed and caused to be artificially held back by said dam so that its elevation since the erection thereof is approximately 22

feet above normal elevation but denies that commerce and navigation to and from the Mississippi River to points of the Willow River can no longer be carried on for the reason that there was no such commerce and said Willow River is not and never was able to carry such commerce and the plaintiff denies that the dam of the plaintiff in any manner interferes with the free, natural, and unimpeded flow of the water from the Willow River, except as lawfully authorized by the customs and laws of the State of Wisconsin and the decisions of its courts.

7. With respect to the allegation beginning on the bottom of page 17 of said answer, plaintiff admits the passage of the act therein referred to and admits that no authority or approval was ever obtained from the United States or any of its officers or representatives for the erection of said dam and alleges that the reason therefor was that none was required. Plaintiff denies that the dam at the mouth of the Willow River was erected after the passage of the act of Congress and denies that the dam at the mouth of the Willow River was reconstructed in the year 1934 as alleged in said answer but alleges the fact to be that the dam at the mouth of the Willow River had been constructed and maintained many years prior to the passage of the act referred to. That to promote the

27 of said power site and said dam, the plaintiff herein and its predecessors in title long prior to the passage of the act approved March 3, 1899, referred to in said answer cut a channel through an embankment on the fast land upon its own property and upon the fast land along the St. Croix River so as to effect a new entrance for the water coming down the Willow River into the St. Croix River, and therein erected a dam and as part thereof installed the usual gates, water wheels, turbines, generators, etc. for the generation of power and thereafter discharged the water, impounded by the said dam previously erected across the Willow River, through such water wheels and turbines by means whereof it has generated power and operated its utility properties. That by the local customs and laws of the state of Wisconsin and the decisions of its courts the owner of property along both navigable and nonnavigable streams owns and possesses title to low water mark upon navigable streams and the entire bed of nonnavigable streams and such right is a valuable property right which cannot be taken from such owner for public use except for just and adequate compensation, by reason whereof the plaintiff herein has owned and now owns the property to the low water mark on the St. Croix River or approximately at elevation 666 feet above mean sea level and owns the entire bed of the Willow River at and near its mouth.

8. That prior to the erection of defendant's dam No. 3 the plaintiff herein was able to completely discharge the water from its dam without hindrance or interruption except during a very limited period of high water in the St. Croix River but since the
28 erection thereof the plaintiff's dam has been destroyed to the extent and in the manner set forth in the petition herein and, that in accordance with the local customs and the laws of the State of Wisconsin and the decisions of its courts, there has been and is a taking by the government of the United States for which the plaintiff herein is entitled to compensation from defendant.

9. With respect to the last paragraph of paragraph No. 5 of the Answer appearing on page 19 of said answer, plaintiff has no information sufficient whereon to base a belief and therefore puts defendant to its proof.

10. With respect to paragraph No. 7 of the answer appearing on pages 19-20 of said answer, plaintiff denies that no fast land, the ownership of which has been claimed by the plaintiff, has been invaded as a result of the construction by the defendant of the dams aforementioned and alleges that it has been ousted from the use and enjoyment of fast land and of hydroelectric power formerly produced and generated by said dam, and alleges that it has not been able to produce hydroelectric power in equivalent amounts at the times as before the operation of the government dams or at any time.

And the plaintiff shows to the court.

AS TO THE ANSWER TO THE SECOND CAUSE OF ACTION

1. Plaintiff admits, denies, qualifies, and explains the parts of the defendant's answer incorporated by reference in paragraph 2
29 in the manner and to the extent responsive, pertinent and material to the reply to this cause of action by incorporation and reference to the allegations in its reply to the answer to the first cause of action.

2. Plaintiff alleges that the dam site riparian to Apple River topographically is situated at a ground elevation so as to be reached by and is actually reached by and flooded out by the back water that normally backs upon such site by reason of the construction of dam No. 3 across said Mississippi River and that by reason of such fact such site as a potential and suitable site for a future dam for the generation of hydroelectric power has been taken, appropriated, physically damaged, reduced in value, and otherwise affected, all as a consequence of the construction by the United States of lock and dam No. 3 across the Mississippi River.

Wherefore, the plaintiff demands that the prayer of its petition be granted.

R. M. RIESER,
Attorney for Plaintiff.

LYNN ASHLEY,
Of Counsel.

[*Duly sworn to by A. R. Schultz; jurat omitted in printing*]

30 *Argument and submission of case*

On June 8, 1943, the case was argued and submitted on merits by Mr. R. M. Reiser for plaintiff, and by Mr. P. M. Cox for defendant.

31 *Special findings of fact, conclusion of law and opinion of the court by Whaley, Ch. J.*

Filed Feb. 7, 1944

Mr. R. R. Rieser for the plaintiff. Mr. John Wattawa and Rieser & Mathieys were on the briefs.

Mr. P. M. Cox, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. The plaintiff, Willow River Power Company, is a public utility company of the State of Wisconsin. During the times here involved it developed electric power hydraulically and by other means and sold it to the surrounding community. Its power plant was located near the confluence of the Willow River and the St. Croix River, in the city of Hudson, Wisconsin, on land owned by it above ordinary high water of the St. Croix River.

2. Willow River is a nonnavigable stream in the State of Wisconsin and enters the St. Croix River at Hudson. The St. Croix River is a navigable stream, in its lower reaches forming the boundary between Wisconsin and Minnesota. It enters the Mississippi River, also a navigable stream, at Prescott.

In times past logs were boomed down portions of the Willow River in time of spring freshets by means of dams and sluices. This industry has long since been abandoned. Dams erected for that special purpose were in course of time succeeded by dams erected for the single purpose of developing electric power hydraulically.

3. The plaintiff operates four such plants on the Willow River.

32 Beginning near the mouth of the river, at Hudson, is a plant which, before the cause of action here complained of, had a maximum head of $22\frac{1}{2}$ feet, known as the St. Croix plant, and is the plant here in controversy. It has two 150-kilowatt generators attached to vertically operated turbines.

The next one upstream is the Little Falls plant, with a maximum head of 22 feet and a unit of 300 kilowatts.

The third one in order is the Willow Falls plant, with a maximum head of 107 feet, with two 300-kilowatt generators.

The fourth one upstream is the Mounds plant, with a head of 50 feet and a 180-kilowatt generator.

These four plants form a system and are operated by plaintiff as such.

None of the dams has locks or sluiceways, and none is provided with passage for any form of vessel.

The dam at the St. Croix plant is the oldest of the dams and was erected in the latter part of the 19th century.

4. The St. Croix River enters the upper Mississippi at Prescott, and from Prescott to slightly beyond Stillwater on the St. Croix, upstream from the junction of the Willow River and the St. Croix River, the St. Croix is in the form of a greatly elongated lake.

Pursuant to Congressional authorization, defendant erected near Red Wing, Minnesota, a dam designated No. 3 and herein-after termed the "Red Wing Dam." The pool created above the dam had an ordinary height of 675 feet above mean sea level and extended up the Mississippi and to Stillwater on the St. Croix River, or beyond plaintiff's St. Croix plant.

The pool was created by the Red Wing Dam on August 12, 1938.

Where the water of Willow River empty into Lake St. Croix through the St. Croix plant, the ordinary level of Lake St. Croix after the erection of the Red Wing Dam was approximately 675.3 feet.

The Red Wing Dam may be operated in such manner that in times of flood the current may be allowed to flow as under natural conditions, except for a slight swell. It is located about 15 miles downstream from the junction of the St. Croix and Mississippi Rivers. Hudson is about 15 miles upstream on the St. Croix River from Prescott.

33 5. Before creation of the pool back of the Red Wing Dam the ordinary high-water level of Lake St. Croix at plaintiff's St. Croix plant was 672 feet mean sea level. The Red Wing pool did not affect the levels of Willow River, but it did raise the ordinary high-water mark of Lake St. Croix at plaintiff's St. Croix plant about 3 feet, raising the water level in the tailrace of plain-

tiff's plant by that amount, which decreased the head of plaintiff's dam by 3 feet. This diminished plaintiff's hydroelectric power at the St. Croix plant. The head above ordinary high water before the erection of the Red Wing Dam was 17 feet.

In order to make up this deficiency plaintiff entered into a contract with Northern States Power Company, October 10, 1938, whereby the Northern States Power Company agreed to supply electric current to the plaintiff "to the extent of Five Hundred (500) Kilowatts of Demand, for Customer's [plaintiff's] use for light, heat, and power, for public and private use in the communities and rural areas now served from Customer's transmission and distribution system," the energy thus supplied to be used as auxiliary to the plaintiff's own generating facilities. A copy of this contract is marked in evidence as plaintiff's exhibit "S" and is made a part hereof by reference.

This energy was to be delivered to plaintiff at the plant of the Northern States Power Company. In order to transmit it to plaintiff's plant it was necessary to build a transmission line, which was done at a cost of \$21,000.

6. The value of the loss in power as a result of the raising of the level of the St. Croix River by 3 feet above ordinary high water was \$25,000 at the time and place of taking.

7. The plaintiff abandons its claim with respect to destruction of site for a dam and possible waterpower head on the Apple River, and no findings in connection therewith are made.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover the sum of \$25,000, with interest at $4\frac{1}{2}$ percent per annum, from August 12, 1938, to the date of payment of judgment, not as interest but as a part of the just compensation.

34 It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-five thousand dollars (\$25,000), with an additional amount measured by interest at the rate of four and one-half ($4\frac{1}{2}$) percent per annum on twenty-five thousand dollars (\$25,000) from August 12, 1938, to the date of payment of the judgment, not as interest but as a part of the just compensation.

Opinion

WHALEY, Chief Justice, delivered the opinion of the court:

This is a suit to recover for the loss of the power capacity of plaintiff's dam on the Willow River caused by the erection by the

defendant of the Red Wing Dam on the Mississippi River. Plaintiff's hydroelectric power plant was at the mouth of the Willow River, which river empties into the St. Croix River. The St. Croix is a tributary of the Mississippi River and is a navigable stream. Plaintiff's dam and power plant was on land owned by it above ordinary high water, but the tailrace from its plant emptied into the St. Croix River below ordinary high water. As the result of the erection by the defendant of the Red Wing Dam on the Mississippi River the water level of the St. Croix River was raised and backed up into plaintiff's tailrace.

The case presents several issues, the first of which is whether or not the Willow River is a navigable stream. If it is a navigable stream, then plaintiff's rights in its dam and power plant were subject to the paramount right of the defendant to take all necessary measures to improve navigation. *United States v. Chandler-Dunbar*, 229 U. S. 53, 62; *United States v. Chicago, Milwaukee, St. Paul, & Pacific Railroad Co.*, 312 U. S. 592, 595.

The Supreme Court of Wisconsin, in *Willow River Club v. Wade*, 100 Wis. 86; 76 N. W. 273, held that this river was a navigable stream. The Willow River ran through the property of the plaintiff, Willow River Club. The action was brought to recover damages alleged to have been suffered by the plaintiff by the catching of fish in that part of the Willow River which ran through its property. Under the Wisconsin law, if the river was navigable, then the defendant had the right to catch fish in any part of the river, because the title to the bed of navigable streams was in the State. The court held that it was navigable and denied recovery. The stream was held to be navigable because the proof showed that a long time previously logs had been floated down the river in times of spring freshets. This was the only proof that the river had ever been used, or in its natural state was capable of use, for commerce and the transportation of persons and property.

However, in a later case the Wisconsin Supreme Court rejected this as a test of navigability in a case involving the right of the defendant to construct a dam across one of the rivers of the State. The Mill Dam Act (chapter 146, Statutes of Wisconsin, 1898) permitted the erection of dams on nonnavigable streams but prohibited their erection on navigable streams without the consent of the State. The proof in that case (*Allaby, et al. v. Mauston Electric Service Co.*, 135 Wis. 345, 351; 116 N. W. 4, 6) showed that logs, had been floated down the stream in question, but the court said:

“* * * From these considerations we are constrained to the conclusion that the testimony which tended merely to show that

this stream was so capable of floating logs that the public might be entitled to right of highway therein for that purpose was wholly insufficient to establish that it was navigable within the meaning of chapter 146."

The decision in this case weakens the authority of the decision in *Willow River Club v. Wade*, supra.

However, in a suit such as the one in the case at bar, navigability is a Federal question, and Federal courts are not bound by the decisions of State courts thereon. *Economy Light & Power Co. v. United States*, 256 U. S. 113, 123; *United States v. Holt State Bank, et al.*, 270 U. S. 49, 56.

Under the decisions of the United States courts it is clear that the mere fact that logs are floated down a stream in times of high water does not make the river navigable in the sense that the United States under its commerce power has paramount rights in the stream in the interest of navigation. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 698-699; *United States v. Utah*, 283 U. S. 64, 87.

There has been no decision of a Federal Court on the navigability of the Willow River. Whether or not it is navigable is a question of fact. *The Daniel Ball v. United States*, 10 Wall. 557; *United States v. Utah*, supra.

We are clearly of the opinion that the Willow River is not a navigable stream in the sense that the United States may regulate commerce thereon. There is no commerce thereon to be regulated and there never has been. The only transportation the river has ever afforded is to float down logs in times of spring freshets. Except at these times logs cannot be floated down the river. The river is but 40 miles long in a straight line and 70 miles long following its meanders. In some places it is so narrow that the branches of trees on one bank are interlocked with the branches of trees on the other bank. The depth of the water varies from 2 inches to 12 or 14 inches. Fencing extends across the stream in agricultural areas. The stream has never been meandered by the Government. Since the erection of dams by the plaintiff the pools created by them are used for recreational purposes only. The proof is entirely insufficient to show that the river in its ordinary condition or with artificial aids is suitable for commercial navigation. *The Daniel Ball v. United States*, supra; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377.

Liability of the defendant, therefore, depends upon whether or not the level of the St. Croix River was raised above ordinary high-water mark. It had a right to raise the level of the river to ordinary high-water mark with impunity, but it is liable for the tak-

ing or deprivation of such property rights as may have resulted from raising the level beyond that point. Kelley's Creek & Northwestern Railroad Co. v. United States, No. 44631, C. Cls., decided October 4, 1943, and cases there cited.

The proof shows clearly that the ordinary level of the St. Croix River was raised to 675 and a fraction feet. The plaintiff says that ordinary high-water mark before the level was raised was at elevation 672 feet, and the defendant says it was 676 feet. We are satisfied from the proof that it was not higher than 672 feet.

The plaintiff has introduced numerous photographs showing large trees standing in the water after the raising of the level. These are standing in depths of water varying from 1.2 feet to 4.7 feet. This was at a time when the level of the river was at its ordinary level of 675.3 feet. The defendant itself introduced hydrographs showing the levels of the river at Hudson, where plaintiff's plant was, and at Stillwater, some miles upriver from plaintiff's plant, and at Prescott, where the St. Croix empties into the Mississippi. The hydrographs at Hudson begin in

37 May of 1936. An examination of these hydrographs shows spring floods beginning in March or April and lasting through June and into July. After the subsidence of these floods these graphs show that the river maintained a level varying between 667 feet and 670 feet until the erection of the Red Wing Dam on the Mississippi River on August 12, 1938, since which time the graphs show that the ordinary level of the river is at about 675 feet. In November of 1939 the gates in the Red Wing Dam were opened, and the graphs show that during the period they were open the level of the river fell from 675 feet to 672 feet. There is no doubt in our minds that plaintiff's experts are correct in their testimony that the ordinary high-water mark before the erection of the Red Wing Dam did not exceed 672 feet.

The defendant says that it did not take any portion of plaintiff's property, that it merely decreased the head of plaintiff's dam, and that plaintiff is not entitled to recover therefor as for a taking. This position, however, is contrary to the decision of the Supreme Court in *United States v. Cress*, 243 U. S. 316, 329, 330. Two cases were discussed in that opinion. With reference to No. 718 the court said:

"In No. 718 there is a contention that, because the backwater is confined to Miller's Creek, it does not amount to a taking of land. But the findings render it plain that it had the necessary effect of raising the creek below the dam to such an extent as to destroy the power of the mill dam that was essential to the value of the mill; or, as the findings put it, 'The water above the lock and

dam, when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill.' Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land."

The authority of this case is somewhat weakened by the court's opinion in *United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, supra, in which the court said, "What was said in the Cress case must be confined to the facts there disclosed"; but the 38 facts of that case on this point are identical with the facts here. The case has not been overruled and we have no option but to follow it. It results that plaintiff is entitled to recover the value of the decrease in the head of its dam.

The exact determination of that value is difficult from the proof introduced. We are furnished with involved calculations, such as we might expect and perhaps have a right to expect from engineers specializing in hydroelectric fields. But the amount of just compensation to be awarded may not include one factor to the exclusion of all others—it is a far more complex proposition than, say, the mere ascertainment of quotations on the exchange, usual returns on investments, or mathematical formulae. *Hetzel v. Baltimore & Ohio R. Co.*, 169 U. S. 26; *Standard Oil Co. v. So. Pacific Co.*, 268 U. S. 146; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359; *Story Parchment v. Paterson Paper Company, et al.*, 282 U. S. 555.

Among the factors to be taken into consideration is such an amount as when capitalized at a certain percentage will produce yearly the revenue which plaintiff has lost by reason of the reduction of power caused by the backing up of water into the tailrace.

Taking all relevant proof into consideration, we have arrived at an amount of \$25,000, by way of a jury verdict, as justly compensating the plaintiff for that which the defendant has taken from it, as of the time and place of taking, adding thereto and as a part thereof 4½ per cent per annum on \$25,000 from August 12, 1938, down to the date of payment of judgment.

Judgment is rendered accordingly. It is so ordered.

MADDEN, Judge; WHITAKER, Judge; and LITTLETON, Judge, concur.

Plaintiff's Exhibit No. 5—Made a part of the court's findings by reference

This agreement, made this 10th day of October A. D. 1938, by and between Northern States Power Company, a Wisconsin corporation, party of the first part, hereinafter called the "Company," and the Willow River Power Company, a Wisconsin corporation, party of the second part, hereinafter called the Customer":

Witnesseth: That the parties hereto, each in consideration of the agreements of the other, agree as follows:

1. The Company will supply electric service in the form of three phase, alternating current at approximately 2,300 volts and 60 cycles per second, to the extent of Five Hundred (500) Kilowatts of Demand, for Customer's use for light, heat, and power, for public and private use in the communities and rural areas now served from customer's transmission and distribution system. Said power shall be available for Customer's use and will be supplied subject to agreements contained herein and in "Terms and Conditions" attached hereto and made a part hereof; energy to be delivered at Customer's substation at Cedar Falls and metered at Company's switchboard as now located in its hydroelectric generating station at Cedar Falls.

2. In order to permit the energy above specified to be delivered to the Customer, the Customer agrees to extend its transmission line from Knapp, Wisconsin, to the point of delivery above specified, and to provide the necessary transformers, switches, and protective apparatus so that Customer will be in a position to take energy to the extent and at the voltage, phase, and frequency heretofore described.

3. Customer agrees to use power only as herein stated, and will not assign this Agreement except upon written consent of the Company.

40 4. It is understood that the energy to be supplied the Customer hereunder is to be used as auxiliary to Customer's own generating facilities in supplying the requirements of its patrons, and that Customer shall have the right to exceed the Demand specified in Section 1 hereof up to an aggregate demand of One Thousand (1,000) Kilowatts, upon reasonable notice to Company from Customer specifying the additional amount of power and the date same will be required.

5. Customer agrees to pay at Company's office in Eau Claire, Wisconsin, or at such other place as Company may designate, on

or before the tenth day succeeding the date of bill rendered, for service supplied in the previous month at the following schedule of rates:

DEMAND CHARGE

First 25 kilowatts or less of billed demand, \$62.50 per month.
Next 25 kilowatts of billed demand @ \$2.50 per kw. per month.
Next 150 kilowatts of billed demand @ \$2.00 per kw. per month.
Excess kilowatts of billed demand @ \$1.25 per kw. per month.

plus

ENERGY CHARGE

First 10,000 kilowatt-hours per month @ 2.0¢ per kilowatt-hour.
Next 20,000 kilowatt-hours per month @ 1.5¢ per kilowatt-hour.
Next 70,000 kilowatt-hours per month @ 1.0¢ per kilowatt-hour.
Excess kilowatt-hours per month @ 0.8¢ per kilowatt-hour.

SUBSTATION DISCOUNT

First 100 kilowatts of billed demand 20¢ per kilowatt per month.
Excess kilowatts of billed demand 15¢ per kilowatt per month.

PROMPT PAYMENT PROVISION

A discount of 5% on the first \$25.00 and 1% on the excess of the total bill will be allowed for payment within the discount period.

DETERMINATION OF DEMAND

The Maximum Demand in kw. and reactive kv.-a. shall be determined as the highest average rate at which energy and reactive kv.-a. hours, respectively, are used for any period of fifteen (15) consecutive minutes during the month.

41

DETERMINATION OF BILLED DEMAND

1. Standard watt-hour and reactive component meters equipped with maximum demand attachments will normally be used for metering three-phase loads, and the demand upon which the demand charge shall be computed (except in such emergencies as are provided for in Section 6 following) shall be determined as follows:

a. If the ratio of maximum reactive kilovolt amperes to maximum kilowatts is less than 75%, the maximum registered kilowatt demand shall be used for billing purposes.

b. If the ratio of maximum reactive kilovolt amperes to maximum kilowatts exceeds 75%, the demand for billing purposes shall be determined each month by the following formula:

Billed demand equals 0.8 times the square root of the sum of the squares of the kilowatt demand and the reactive kilovolt ampere demand.

c. Reactive component meters will be ratcheted so only lagging reactive kilovolt-ampere hours will be recorded.

2. In no month shall the Billed Demand be considered as less than the highest demand previously billed under this contract, nor in any event less than 100 kw.

6. In case of emergency on Customer's system caused by fire, explosion, flood, or windstorm, the Company agrees to supply Customer the electrical energy requested by it to the extent of Company's ability to supply the amount requested without injury or inconvenience to itself or its other customers. Upon notification that such emergency exists the Company will read the Company's meters as soon as possible and will, upon notification that such emergency is over, again read the meters for the
42 purpose of determining the energy supplied during said emergency. The energy supplied between said meter readings will not be considered in determining the monthly bill in accordance with Section 5 above, but will be billed separately at the rate of 2.5 cents (\$0.025) net per kilowatt-hour and Customer shall pay said bill within ten days from date thereof. Notification of emergency shall be given to the Company's plant operator at Cedar Falls or such other person as Company may designate in writing.

7. Customer further agrees that service to be supplied hereunder is contingent upon the Company having the necessary permits and rights-of-way to enable the Company to carry out the terms of this Agreement.

8. This Agreement shall continue in force for a term of Ten (10) Years, commencing on the 12th day of April 1939, provided, however, that the Customer shall have the right to cancel this Agreement at the end of the first five-year period hereof by giving written notice of its intention so to do to the Company six months prior to the expiration of such five-year period.

In witness whereof, the respective parties hereto have caused this Agreement to be executed in duplicate by their proper officers thereunto duly authorized, and their respective corporate seals to

be hereunto affixed, and the same shall be equally binding upon the respective parties, and each of their successors and assigns.

[CORPORATE SEAL]

NORTHERN STATES POWER COMPANY,
By G. O. RORK,
And G. M. GOBLIN.

[CORPORATE SEAL]

WILLOW RIVER POWER COMPANY,
By ALFRED R. SCHULTZ, *President*.
And BERTHA A. BURKHARDT, *Secretary*.

In Presence of:

ALMA LIEN.

ALMA SCHULZ.

JOSEPHINE G. MURPHY.

CHRISTINE CASANOVA.

43. TERMS AND CONDITIONS REFERRED TO AND MADE A PART OF
THIS AGREEMENT

1. Electrical energy will be supplied and measured by the Company at the switchboard of the Company in the form of three-phase alternating current, at a nominal voltage of twenty-three hundred (2,300) and a nominal frequency of sixty (60) cycles per second, and shall not be subject to fluctuations of potential or frequency of sufficient extent to interfere with the proper operation of power apparatus duly installed hereunder.

2. The Company shall connect its lines to the lines of the Customer at the substation of the Customer.

3. The Company shall, at its own expense, furnish, install, and keep in repair the necessary meters and other current measuring devices.

The Customer may, at its option, and at its own expense, install a duplicate or check demand meter, and a duplicate or check watt-hour meter alongside those of the Company for the purpose of checking the Company's meters, and in the event of failure of the meters so placed to check with each other, either party shall have the right to call upon the other for a test of one or both of such meters, which test shall be made by a competent disinterested third party to be selected by the parties hereto. Such test shall be made by such third party promptly and not later than thirty (30) days after his selection, and in the presence of the representatives of each of the parties hereto. In the event of error in the Company's meter or meters exceeding two percent (2%), proper allowances, as shown by the test, shall be made to the party entitled thereto, but not for a longer period than sixty (60) days prior to the time such inaccuracy is proven.

The cost of all tests shall be paid by the party requesting the same, but if, at any test, the Company's meter shall be found to be in error exceeding two percent (2%), the cost of such tests shall be borne by the Company.

4. All wiring, and other electrical equipment or apparatus on the Customer's side of the Customer's service outlet, shall be furnished and installed and kept in repair by the Customer, and the Company shall not be required to supply or to continue to supply any current hereunder unless such wiring, equipment, and apparatus are, from time to time, duly approved by the Company.

5. The Company shall at all times exercise due diligence in operating its plant so as to furnish the Customer, as nearly as practicable, an uninterrupted and regular supply of electrical energy. But in case the Company shall be prevented from delivering electrical energy, wholly or in part, by fire, explosion, flood, strike, or unavoidable accident, Federal, State, or Municipal interference, or any other cause not reasonably within its control, it will (except in case of a practically total destruction of its property, or practically total suspension of its business) proceed with all reasonable diligence to put itself and its works in condition to continue the supply of electrical energy, and such partial or total interruption of service shall not constitute a breach of this contract, nor shall the Company be liable for damages by reason of failure from any of said causes. Proportionate reduction in such case shall be made from the amount of the monthly demand charge payable under the provisions of this contract.

44 6. If the Customer, on account of unavoidable accident, fire, explosion, flood, strike, Federal, State, or Municipal interference, or any other cause not reasonably within its control, be prevented wholly or partially during the term of this contract, from receiving, taking, and using the current delivered by the Company, the Customer agrees to proceed with all reasonable diligence to put itself and its works in condition again to utilize the normal amount of current; and in case of such shut-down or interference, if the Customer shall have promptly given notice in writing to the Company, at its office, at Eau Claire, Wisconsin, or any other office hereafter designated by the Company, of the shut-down or interference, the probable duration and cause thereof, the operation of this agreement and the obligation of the Customer hereunder to take and pay for electrical energy shall be suspended to the extent of such shut-down or interference, during such period of interruption, and proportionate reduction shall be made from the amount of the monthly demand charge payable under the provisions of this contract.

7. The Company may at any time during the term of this contract, on Sunday morning, between the hours of one (1) and six (6) o'clock, suspend delivery of electrical energy under this contract for the purpose of making repairs on or improvements in, upon, or around any part of its hydroelectric or generating plants or distributing system; provided, however, that the Company shall, in every case, give the Customer such reasonable notice thereof as circumstances will permit.

8. If the Customer shall make default in any of its agreements herein contained, the Company may, on thirty (30) days' notice in writing to the Customer, suspend delivery, such suspension not to interfere with enforcement by the Company of any legal right or remedy. No delay by the Company in enforcing any of its rights hereunder shall be deemed a waiver of such rights; nor shall a waiver by the Company of one of the Customer's defaults be deemed a waiver of any other or subsequent defaults.

45

SUPPLEMENTARY AGREEMENT

This Agreement, made this 10th day of October 1938, by and between the Northern States Power Company, a Wisconsin corporation, hereinafter called the "Company," and the Willow River Power Company, a Wisconsin corporation, hereinafter called the "Customer," witnesseth:

Because of the lack of sufficient knowledge as to the operating characteristics of the Customer's system when electrical energy is furnished to it under the contract between the parties hereto of even date herewith, it is hereby stipulated and agreed that for a period not exceeding three months after energy is first supplied hereunder Customer will be billed for 100 kw. demand, even though the demand recorded is in excess of this amount.

During this three month period the Customer agrees to ascertain and determine the amount of power required for its use, the extent of variations in power required, the extent of unavoidable variations because of physical limitations of the Customer's system, and the modifications of Customer's methods of operation necessary for proper operation of Customer's system.

It is further agreed that this Agreement shall modify said Agreement of even date herewith only to the extent herein specifically provided.

In witness whereof, the respective parties hereto have caused this Agreement to be executed in duplicate by their proper officers thereunto duly authorized, and their respective corporate seals to be hereunto affixed, all on the day and year first above written,

and the same shall be equally binding upon the respective parties, and each of their successors and assigns.

[CORPORATE SEAL]

NORTHERN STATES POWER COMPANY,
By G. O. RORK.
And G. M. GOBLIN.

[CORPORATE SEAL]

WILLOW RIVER POWER COMPANY,
By ALFRED R. SCHULTZ, *President*.
And BERTHA A. BURKHARDT, *Secretary*.

In Presence of:

ALMA LIEN.
ALMA SCHULTZ.
JOSEPHINE G. MURPHY.
CHRISTINE CASANOVA.

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Judgment of the court

Feb. 7, 1944

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover the sum of \$25,000, with interest at $4\frac{1}{2}$ percent per annum, from August 12, 1938, to the date of payment of judgment, not as interest but as a part of the just compensation.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-five thousand dollars (\$25,000), with an additional amount measured by interest at the rate of four and one-half ($4\frac{1}{2}$) percent per annum on twenty-five thousand dollars (\$25,000) from August 12, 1938, to the date of payment of the judgment, not as interest but as a part of the just compensation.

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Proceedings after judgment

On April 6, 1944, the defendant filed a motion for a new trial.

On May 1, 1944, the court entered the following order on said motion:

ORDER

It is ordered this 1st day of May 1944, that the defendant's motion for a new trial be and the same is hereby overruled.

On June 14, 1944, the defendant filed a motion for leave to file "notice of intention to file petition for certiorari" in lieu of petition for certiorari as required by Rule 99 (a), and said motion was allowed on June 15, 1944.

On June 15, 1944, the defendant filed a request for record in re certiorari together with other portions of the record proposed by defendant, and its intention to file petition for certiorari and specification of errors.

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Proceedings after judgment continued

On June 23, 1944, the plaintiff filed a motion to extend time to July 3, 1944, for filing copies of parts of the evidence considered material for the record in re certiorari under Rule 99 (a), and said motion was allowed June 23, 1944.

On July 3, 1944, the plaintiff filed its application for additional parts of record in re certiorari under Rule 99 (a), together with the other parts of the record so requested.

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Order of court settling record

July 12, 1944

The within transcript prepared from the original record in this court in the above-styled case having been proposed in part by defendant and in part by plaintiff as that portion of the record material to the errors assigned in the defendant's notice of intention to file a petition for a writ of certiorari, and neither party having objected thereto, and such transcript having been considered and found to be an accurate statement of the portions of the original record material to the errors assigned, the same is (with the exception of the report of the commissioner, the defendant's exceptions thereto and request, and defendant's motion for a new trial and for amended and additional findings of fact requested by the defendant) this 12th day of July 1944, hereby settled and approved.

By the court :

RICHARD S. WHALEY,

Chief Justice.

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[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.